

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2012-1774

MICHAEL A. LINGO, GREGORY B. WILLIAMS, WILLIAM GLICK,

Plaintiff-Appellants,

-v-

STATE OF OHIO; RAYMOND J. WOHL, CLERK OF THE
BEREA MUNICIPAL COURT,

Defendant-Appellees.

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ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT
COURT OF APPEALS CASE NO. 97537

DEFENDANT-APPELLEE, RAYMOND J. WOHL, CLERK OF
THE BEREA MUNICIPAL COURT'S
MERIT BRIEF

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INTRODUCTION

In this appeal, Defendant-Appellee, Raymond J. Wohl, Clerk of Court of the Berea Municipal Court (“Appellee”) advocates for, among other things, preserving long standing and fundamental principles of subject matter jurisdiction conferred upon the courts of common pleas by the Ohio Constitution and upon the statutory courts by the Ohio legislature, for principles of finality in resolving once and for all matters which come before the statutory courts, and to preserve the integrity of the appellate process as established by the Ohio Constitution. These principles, collectively, establish certainty in legal relations and individual rights, accord stability to judgments, and promote the efficient use of limited judicial or quasi-judicial time and resources

In stark contrast, by this class action and in this appeal, Plaintiff-Appellants, Michael Lingo, Gregory Williams and William Glick, (“Appellants”) seek this Court’s approval of the usurpation of jurisdiction by one common pleas court in Cuyahoga County over the Berea Municipal Court and further seeks to expand the usurpation of jurisdiction over all of the statutory courts throughout Ohio, in order to review alleged illegal “court cost collection practices” of those statutory courts. In the process, Appellants would have this Court ignore the doctrine of *res judicata* and further seek to bypass well-established principles of appellate review. The result is to revisit (and profit) from matters which had intended to be finally and conclusively resolved in the statutory courts.

Appellants’ alleged concerns for advancing responsible government are not resolved by up-ending well established principles of subject matter jurisdiction, the finality of judgments, and the integrity of the appellate process. These fundamental and well established principles should not be thrown out to convenience a class of individuals whose traffic and criminal matters have

been previously heard before and conclusively determined by the statutory courts. It is in these statutory courts, indeed, in all trial courts, where the issues of allocation of court costs are best heard and decided, subject of course to the right of a direct appeal to the courts of appeals.

STATEMENT OF THE CASE AND FACTS

A. Municipal Court Proceedings

Appellant William Glick (“Mr. Glick”) was pulled over by the Middleburg Heights police on August 22, 2004 for suspicion of driving under the influence of alcohol. Mr. Glick was charged with two violations, DUI and a lanes violation. *R. 104 (Deposition of William Glick, at 13, Consolidated Defendant’s Brief on Summary Judgment.)* Mr. Glick appeared before the Berea Municipal Court on those charges and, with assistance of defense counsel, entered into a plea agreement wherein the DUI was reduced to a reckless operation charge to which he pled guilty in open court and the lanes violation was dismissed at his cost. *R. 104, at 15-17.* Pursuant to the Municipal Court order, the Clerk of Court calculated the court costs and presented an itemized statement to Mr. Glick who voluntarily paid the court costs assessed to him for both the reckless operation charge and lanes violation charge. *R. 104, at 17.* As a result of the plea agreement, Mr. Glick avoided a trial on the merits of both charges and the potential jail time, penalties and license suspensions which come with a DUI conviction.¹ *R. 104, at 18-21.*

¹ By pleading guilty to the reduced charge of reckless operation, Mr. Glick avoided the potential sentence of a mandatory jail term of three consecutive days (which may be suspended if a community control sanction is imposed), a fine of not less than \$250.00 and not more than \$1,000.00, and a class five license suspension. Middleburg Heights Municipal Ordinance §434.01(h)(1)(A). In addition, Mr. Glick would have been assessed a total of 6 points for an OVI-Alcohol/Liquor violation. R.C. §4511.19(A). For a reckless operation conviction, Mr. Glick was assessed a total of 4 points. R.C. §4510.15.

B. The Clerk of Court's Duties and Responsibilities

Appellee Wohl is the duly elected Clerk of Court for the Berea Municipal Court. *R.77 (Affidavit of Raymond J. Wohl, tab 1, Defendant's Motion for Summary Judgment.)* The Berea Municipal Court has jurisdiction over the communities of Berea, Brook Park, Middleburg Heights, Olmsted Falls, Olmsted Township, Strongsville, the MetroParks, and the Ohio State Patrol. The Berea Municipal Court is funded in part from imposition of court costs assessed against defendants in traffic/criminal, civil and small claims court. Depending on the costs being assessed and collected, the Clerk collects costs from traffic offenders then disburses those funds to the General Fund of the City of Berea, other funds within the City of Berea, Cuyahoga County or the State of Ohio. Monies disbursed to the City of Berea are used to pay operating expenses of the Berea Municipal Court including payment of salaries, benefits, and general administrative expenses necessary for operation of the Municipal Court. In sum, Berea Municipal Court expenditures can exceed disbursements to the general fund of the City of Berea. Shortages are made up from disbursements from other funds within the City of Berea.

Basic court costs pursuant to Ohio R.C. §1901.26 are established pursuant to a Journal Entry and Court Order signed by the duly elected Berea Municipal Court Judge and the duly elected Clerk of Court. *R. 77 (Wohl Affidavit, tab 1.)* Basic court costs are published by the Clerk on a poster board which is maintained in a conspicuous location within the filing area of the Clerk of Courts and is viewable by the public. Basic court costs are also published on the Berea Municipal Court's website.

C. The Class Action Allegations

On June 8, 2005, Appellants filed a Class Action Complaint for Declaratory Judgment, Injunction and Other Equitable Relief against the State of Ohio. *R. 1.* On September 13, 2006,

Appellants amended their complaint by filing their First Amended Class Action Complaint for Declaratory Judgment, Injunction and Other Equitable Relief against the State of Ohio and new-party defendants, Department of Treasury and Raymond J. Wohl, Clerk of the Berea Municipal Court. *R. 56*. In their Amended Complaint, Appellants allege that “[i]n R.C. §2743.70(A) and §2949.091(A) as well as other provisions of Ohio law,² the General Assembly has directed the statutory courts to collect court costs in each ‘case’ involving a defendant who has been convicted of or has pled guilty to one or more offenses. Some of the funds are to be deposited directly by the clerks with the State Treasurer.” *R. 56*, ¶ 7. Appellants further allege that while most statutory courts and their clerks recognize that “costs” may be assessed only once for each “case,” “several statutory courts and their clerks have been imposing costs for each offense charged against the defendant.” *R. 56*, ¶ 8. Continuing, Appellants alleged that “[n]o statutory authority exists for this practice. As a result, numerous defendants have been assessed multiple costs for a single case.” *R. 56*.

Against these quite specific allegations, Appellants allege that Appellee has “authorized, encouraged, and otherwise facilitated the assessment of improper court costs against potentially thousands of Ohio traffic offenders.” *R. 56*, ¶ 13. According to the Amended Complaint, those “costs include, but are not limited to, those remitted to the State under the auspice of R.C.

²The Report and Recommendations of the Joint Committee to Study Court Costs and Filing Fees (July 2008), which was created by the 127th General Assembly, reported to the General Assembly, Governor and Supreme Court of Ohio that there were 94 statutes which provided for the assessment and collection of court costs in Ohio’s “statutory courts” including Municipal Courts, County Courts and Mayors Courts. See Appendix A of the Study. The Study stated the obvious when it concluded that “[d]isbursements of costs under the Ohio Revised Code are complex and tax the time and resources of clerks.” Study, page 5. Thus, Appellants’ reference to “other provisions of Ohio law” hardly placed Appellee on notice of the claims attempted to be set forth in the Amended Complaint.

§2743.70(A) and §2949.091(A).” *Id.* Again, R.C. §2743.70(A)(the reparations fund) and §2949.091(A)(the indigent support defense fund) are the only two statutory provisions of the Ohio Revised Code specifically identified in the Amended Complaint.

Appellee’s answer was filed on November 8, 2006. *R. 64.* Thereafter, on December 6, 2006, Appellee filed his Motion for Summary Judgment on all claims properly pled by Appellants. *R. 77.* Appellants filed their Memorandum in Opposition to Defendant’s Motion for Summary Judgment and Cross Motion for Summary Judgment (“Cross Motion”) on February 20, 2007. *R. 93.* In Appellants’ Cross Motion, Appellants identified and challenged for the first time un-pled theories of what they believe to be “improper collection practices.” *R. 93, at 4-14.* In the Cross Motion, Appellants argued for the first time that various statutory courts, including the Berea Municipal Court, engage in improper cost collection practices including: the “journalization of court costs,” the “imposition of costs without convictions,” and the imposition of “special projects costs.” *R. 93.*

Appellee filed his Consolidated Reply in Support of his Motion for Summary Judgment and Opposition to Plaintiff’s Cross Motion on April 11, 2007. *R. 104.* On October 30, 2007, Appellee filed his motion to dismiss for lack of subject matter jurisdiction. Appellants filed their Opposition on November 9, 2007. *R. 124.*

D. The Supreme Court Proceedings

Appellee also filed in this Court a complaint for a writ of prohibition which was denied in the case captioned *State ex rel. Raymond J. Wohl v. The Honorable Dick Ambrose*, Sup. Ct. 2008-0408. In deciding a prohibition case, this Court’s review was “limited to whether jurisdiction is *patently and unambiguously lacking.*” *State ex rel. Shimko v. McMonagle*, 92 Ohio St.3d 426, 431, 2001-Ohio-301, 751 N.E.2d 472. “In absence of a patent and unambiguous

lack of jurisdiction, a court having general subject matter jurisdiction can determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy by appeal.” *Dzina v. Celebrezze*, 108 Ohio St.3d 385, ¶12, 2006-Ohio-1195, 843 N.E.2d 1202. “Prohibition will not issue as a substitute for appeal to review mere errors in judgment.” *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, ¶28, 2002-Ohio-4907, 775 N.E.2d 522. Thus, “[a]ppeal, not prohibition, is the remedy for the correction of errors or irregularities of a court having proper jurisdiction.” *Smith v. Warren*, 89 Ohio St.3d 467, 468, 2000-Ohio 223, 732 N.E.2d 992.

E. The Class Action Certification Process

Appellants filed numerous and convoluted class action motions and amendments. Their initial Motion for Class Certification filed on August 25, 2005 was based on the allegations contained in Appellant’s initial complaint. *R.11*. Appellant initially sought to certify a class defined as follows:

All individuals who paid court costs on or after June 8, 1995 that were improperly calculated on the basis of the number of offenses charged in proceedings before any Ohio municipal court, county court, or mayor’s court.

After Appellee was added as a new party defendant, on January 3, 2007, Appellee filed his Memorandum in Opposition to Motion for Class Certification. *R. 78*. On February 20, 2007, Appellant filed his Supplement to Motion for Class Certification seeking to modify its proposed class to be:

All individuals who paid court costs on or after June 8, 1995 to an Ohio municipal court, county court, or mayor’s court in excess of the amount specially permitted by a valid state statute.

R. 94.

Apparently recognizing the weakness of his modified class definition, Appellant stated in his Supplement “[i]n the event that this Court finds the foregoing definition to be unacceptable, then [Appellant] proposed [sic] the following alternative class definition”:

All individuals who paid court costs on or after June 8, 1995 to an Ohio municipal court, county court, or mayor’s court under any of the following circumstance:

A. For costs assessed under R.C. 2743.70(A) or 2949.091(A) which were computed on a “per offense” instead of a “per case” basis in violation of Ohio Attorney General Opinion Nos. 91-022 and 91-039.

B. Upon or in connection with any offense that did not result in a conviction, except where the individual affirmatively agreed to accept such charges as part of a plea agreement memorialized in a valid journal entry.

C. For “special project costs” pursuant to R.C. 1901.26(B)(1) where the necessity of such charges for the efficient operation of the court has not been previously established and publicized through a valid court rule.

D. For “special project costs” under R.C. 1901.26(B)(1) that were not imposed upon the filing of each criminal cause.

R. 94, page 2. On April 11, 2007, Appellee filed his Opposition to Appellants’ Supplement. *R. 107.*

On August 9, 2007, Appellant filed a Second Supplement to Motion for Class Certification seeking to amend subsection A of the “alternative” definition to be as follows:

A. For costs assessed under R.C. 2743.70(A), 2949.091(A), and/or 2947.23(A) which were computed on a “per offense” instead of “per case” basis.

R. 110. On August 22, 2007, Appellee filed his Opposition to the Second Supplement. (R. 113).

F. The Common Pleas Court’s Opinion and Appeal to the Court of Appeals

On November 1, 2011, the Trial Court issued its Opinion granting summary judgment on some of Appellants’ claims and further granting class certification to Appellants adopting its own alternative class definitions. *Appellant’s Appendix, 29, ¶60.* Appellee timely appealed raising numerous assignments of error. The Eighth District Court of Appeals properly reversed

the decision of the common pleas court with instructions to grant summary judgment to Appellee. *Appellant's Appendix*, 5. Because the Court of Appeals ruling on the issue of subject matter jurisdiction was dispositive of the entire case, the class action certification was reversed and the Court of Appeals had no reason to further address the substantive issues before it.

With regard to the subject matter jurisdiction of the common pleas court below, the Eighth District Court of Appeals properly held:

{¶22} Just as the common pleas court lacks jurisdiction to review its own final orders, it lacks jurisdiction to review orders from municipal courts. Judicial power is granted to Ohio courts in Section 1, Article IV of the Ohio Constitution. Section 4(B) of Article IV of the Ohio Constitution grants the common pleas court "original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law." Hence, the common pleas court's jurisdiction to act as a reviewing court is limited to administrative appeals. In contrast, Section 3(B)(2) of Article IV authorizes appellate courts "to review final orders or judgments of the inferior courts in their district.

{¶23} Additionally, R.C. 1901.30(A), which governs appeals from municipal courts, provides that "appeals from the municipal court may be taken * * * [t]o the court of appeals in accordance with the Rules of Appellate Procedure and any relevant sections of the Revised Code." The statute does not permit appeals from a municipal court to a common pleas court. Therefore, the common pleas court is without jurisdiction to review the Berea Municipal Court's imposition of court costs. (Emphasis supplied.)

After finding that the common pleas court lacked jurisdiction to review the orders of the municipal court, the Eighth District Court of Appeals properly concluded:

{¶25} It is undisputed that the class representatives paid the costs associated with their municipal court cases and declined to file a direct appeal or seek a stay of their sentences. Consequently, their current attempt to collaterally challenge those costs is barred by *res judicata* and their claims are moot. Without a live case or controversy, the court lacks subject matter jurisdiction over the case. *Morrison v. Steiner*, 32 Ohio St.2d 86, 290 N.E.2d 841 (1972), paragraph one of the syllabus. If a court acts without jurisdiction, then any proclamation by that court is void. *Patton v. Diemer*, 35 Ohio St.3d 68, 518 N.E.2d 941 (1988). Therefore, the trial court's judgment granting class certification is void, and the trial court should have dismissed the case as barred by *res judicata* and for lack of subject matter jurisdiction. (Emphasis supplied.)

Subsequently, Appellants moved the Court of Appeals to reconsider its decision and for en banc review. Appellants also moved the Court of Appeals to certify a conflict. Those motions were overruled by the Court of Appeals with the last en banc motion denied on September 6, 2012.

ARGUMENT

Appellant's Proposition of Law I: A Void Order Is a Legal Nullity and May Be Disregarded by Any Court.

Appellant's Proposition of Law II: Any Attempt by a Municipal Court to Impose Additional Court Costs Beyond that which is Authorized by Statute is Void and Not Merely Voidable.

A. Summary of Argument

Both propositions of law should be rejected. While a void order entered without subject matter jurisdiction is in fact a nullity, there is no authority that it can be collaterally attacked by any court in a class action. A void order can always be vacated by the issuing court. Because the Common Pleas Court lacked subject matter jurisdiction to hear and decide an appeal from an order of the Municipal Court, the Court of Appeals properly reversed the decision below and ordered the purported class action dismissed on remand. On the other hand, the Municipal Court always retains jurisdiction to vacate a void judgment which it has issued. Further, in the event the Municipal Court, having subject matter jurisdiction, imposed court costs beyond that which is authorized by statute, such unauthorized court costs are voidable and subject to a direct appeal. Absent a direct appeal, the issue of court costs is subject to the doctrine of *res judicata* in any subsequent proceedings.

B. A Common Pleas Court Lacks Subject Matter Jurisdiction to Review a Municipal Court's Orders.

The Ohio Constitution vests the courts of common pleas with their jurisdiction. Section 4, Article IV, Ohio Constitution. Section 4, Article IV provides:

The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

The Ohio General Assembly does not have the power to enlarge the jurisdiction of the courts of common pleas beyond the jurisdiction provided in Section 4, Article IV of the Ohio Constitution. *Schario v. State*, 105 Ohio St. 535, 138 N.E. 63 (1922). The language of Section 4(B) does not confer upon the General Assembly any power to provide Courts of Common Pleas with jurisdiction to decide appeals from statutory courts. *See Village of Monroeville v. Ward*, 27 Ohio St.2d 179, 181, 271 N.E.2d 757 (1971), *reversed on other grounds*, 409 U.S. 57; *Kohut v. Vance*, 22 Ohio App.2d 205, 260 N.E.2d 615 (9th Dist. 1970); *State ex rel Bernges v. Court*, 23 Ohio App.2d 89, 90, 260 N.E.2d 839 (1st Dist. 1970); *State ex rel Baker v. Hair*, 31 Ohio App.3d 141, 144, 509 N.E.2d 90 (1st Dist. 1986); and *Citibank S. Dakota v. Woods*, 169 Ohio App.3d 269, 277, 2006-Ohio-5755, 862 N.E.2d 576 (2nd Dist.). Instead, The General Assembly has prescribed that appeals from Municipal Courts be heard by the Court of Appeals. R.C. §1901.30.

In *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, this Court held, at ¶3 of the syllabus: “**A sentencing entry is a final appealable order as to costs.**” (emphasis added). Thus, the General Assembly has prescribed that an appeal from a sentencing entry is a final appealable order as to costs and only the Court of Appeals has jurisdiction to entertain an appeal from or review such entry. The Court of Common Pleas does not have such jurisdiction and cannot act as an appellate court for such review.

The case of *State ex rel Bernges v. Court*, *supra* is instructive. In *Bernges*, the Court of Appeals had before it a petition for a writ to enjoin, restrain and prohibit the Court of Common

Pleas from hearing and deciding an application for an injunction which, in turn, sought an order from the Common Pleas Court restraining a mayor from conducting proceedings involving alleged traffic law violations. The Court of Appeals first determined that the Common Pleas Court “has no jurisdiction to entertain an appeal from an order or judgment of a mayor’s court.” *Id.* at 90. Having determined that the Common Pleas Court lacked jurisdiction to restrain a mayor’s court proceeding, the Court of Appeals issued:

A writ enjoining, restraining and prohibiting the Court of Common Pleas of Clermont County, Ohio, and the judges thereof from hearing evidence and deciding the application for an injunction in case numbered 37862 upon the dockets of that court and ordering that no further jurisdiction be exercised in the matter save to dissolve the temporary injunction issued therein will issue forthwith.

Similarly, in *State ex rel Baker v. Hair, supra*, the plaintiff sought a writ of mandamus requesting that the Court of Common Pleas issue a writ to the Hamilton County Municipal Court to compel transfer of a case back for an arraignment. The Common Pleas Court denied the writ. The Court of Appeals first properly noted that “a writ [of mandamus] ..., commands[s] the performance of an act which the law specially enjoins a duty resulting from an office, trust, or station.” *Id.* at 143. Further, a Common Pleas Court may only issue a writ of mandamus “to another tribunal if that tribunal is ‘inferior’ to the issuing court.” *Id.* The Court of Appeals then held that a municipal court “is not subordinate in rank to the court of common pleas, and thus it is not an ‘inferior tribunal’ with respect to that court.” *Id.* at 144. As such, the Common Pleas Court did not have jurisdiction to issue a writ of mandamus to the Municipal Court compelling any duty.

In the present case, the Common Pleas Court simply did not have jurisdiction to collaterally attack or disregard the judgment of the Municipal Court.

C. Subject Matter Jurisdiction Should Not Be Misconstrued For Acts In Excess of Jurisdiction

Subject matter jurisdiction refers to the court's power to hear and decide a case on the merits. *Morrison v. Steiner*, 32 Ohio St.2d 86, 290 N.E.2d 841 (1972), paragraph one of the syllabus. As this Court has previously noted, the term "jurisdiction" at times tends to be quite liberally applied, and as a result the term "subject-matter jurisdiction" can often be misconstrued. *Cheap Escape Co., Inc. v. Haddox, L.L.C.*, 120 Ohio St.3d 493, ¶ 5, 2008-Ohio-6323, 900 N.E.2d 601; *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, at ¶ 12. Subject-matter jurisdiction relates to the proper forum for an entire class of cases, not the particular facts of an individual case. *Bureau of Support v. Brown*, 7th Dist. No. 00 AP0 742, 2001 WL 1497073 (Nov. 6, 2001), citing *State v. Swiger*, 125 Ohio App.3d 456, 462, 708 N.E.2d 1033 (9th Dist. 1998).

Although the term "jurisdiction" is often used in reference to a court's subject-matter jurisdiction, it is also used in reference to a court's jurisdiction over a particular case. *Pratts*, 102 Ohio St.3d 81, 2004-Ohio-1980, at ¶ 12; *Fifth Third Bank, N.A. v. Maple Leaf Expansion, Inc.*, 188 Ohio App.3d 27, 2010-Ohio-1537 (7th Dist.) . "There is a distinction between a court that lacks subject-matter jurisdiction over a case and a court that improperly exercises that subject-matter jurisdiction once conferred upon it." *Id.* at ¶ 10. The term "jurisdiction" is commonly used when a court makes an unauthorized ruling in a case that is otherwise within that court's subject-matter jurisdiction. *Id.* at ¶ 19-21. This latter use of "jurisdiction" does not relate to subject-matter jurisdiction and would not render a judgment void *ab initio*. *State ex rel. Beil v. Dota*, 168 Ohio St. 315, 321, 154 N.E.2d 634 (1958), quoting *Cline v. Whitaker*, 144 Wis. 439, 129 N.W. 400 (1911), at paragraph three of the syllabus.

It cannot be disputed that the Municipal Court had subject matter jurisdiction over the underlying traffic citation. As a result, the Court of Appeals quite properly found that the allegations of this class action constitute an impermissible collateral attack alleging that the Municipal Court made an unauthorized ruling or otherwise acted “in excess” of the court’s jurisdiction. The Court of Appeals properly found:

{¶18} Appellees assert their claims are not barred by *res judicata* because their judgments of conviction were not final, appealable orders. They claim that Wohl exceeded his jurisdiction by imposing unlawful court costs and that, as a result, the judgments imposing court costs are void. **However, it is well settled that when a judge or judicial officer acts "in excess" of the court's jurisdiction, as opposed to in the absence of all jurisdiction, the act, which is not authorized by law, is voidable, not void.** *Wilson v. Neu*, 12 Ohio St.3d 102, 104, 465 N.E.2d 854 (1984), citing *Wade v. Bethesda Hosp.*, 337 F.Supp. 671 (S.D.Ohio 1971). Moreover, whether void or voidable, the remedy lies in a direct appeal, not a collateral attack on the judgment in a different court. *State ex rel Bell v. Pfeiffer*, 131 Ohio St.3d 114, 2012-Ohio-54, 961 N.E.2d 181, ¶ 20, citing *State ex rel. Hamilton Cty. Bd of Commrs. v. Hamilton Cty. Court of Common Pleas*, 126 Ohio St.3d 111, 2010-Ohio-2467, 931 N.E.2d 98, ¶ 36; *Keith v. Bobby*, 117 Ohio St.3d 470, 2008-Ohio-1443, 884 N.E.2d 1067, ¶ 14; *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851, ¶ 10-16. (Emphasis supplied.)

As stated above, an unauthorized ruling or one made in excess of jurisdiction does not render the judgment void *ab initio*.

D. The Municipal Court Retains Jurisdiction to Vacate a Void Sentence (but the assessment of court costs, even those unauthorized by statute, does not render the sentence void)

The Municipal Court always retains jurisdiction to vacate a void or voidable sentence. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, at ¶ 23 (2008). And, the court of appeals has jurisdiction over a decision granting or denying a motion to vacate an alleged void judgment of the trial court. R.C. §2502.03. The issue of “void” versus “voidable” judgments has received considerable attention by this Court recently. *See, e.g., State v. Billiter*,

134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960; and *Miller v. Nelson-Miller*, 132 Ohio St.3d 381, 2012-Ohio-2845, 972 N.E.2d 568.

In *Miller*, this Court was asked to determine whether the trial court's noncompliance with the signature requirement of Civ. R. 58(A) caused a divorce judgment entry to be void or merely voidable. This Court held "that where a court possesses jurisdiction over the parties and subject matter, mechanical irregularities regarding the trial court's signature render the judgment voidable, not void." *Id.* at ¶1. At ¶12, this Court explained:

¶12 This court has long held that the question of whether a judgment is void or voidable generally depends on "whether the Court rendering the judgment has jurisdiction." *Cochran's Heirs' Lessee v. Loring*, 17 Ohio 409, 423 (1848).

The distinction is between the lack of power or want of jurisdiction in the Court, and a wrongful or defective execution of power. In the first instance all acts of the Court not having jurisdiction or power are void, in the latter voidable only. A Court then, may act, first, without power or jurisdiction; second, having power or jurisdiction, may exercise it wrongfully; or third, irregularly. In the first instance, the act or judgment of the Court is wholly void, and is as though it had not been done. The second is wrong and must be reversed upon error. The third is irregular, and must be corrected by motion."

Id. at 423, quoting *Paine's Lessee v. Mooreland*, 15 Ohio 435, 445 (1846). Thus, a judgment is generally void only when the court rendering the judgment lacks subject-matter jurisdiction or jurisdiction over the parties; however, a voidable judgment is one rendered by a court that lacks jurisdiction over the particular case due to error or irregularity. *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851, at 10, 15.

Public policy reasons fully supported the decision in *Miller*. This Court explained further:

¶18 In addition to the fundamental jurisdictional justifications for finding a defectively signed divorce decree to be voidable rather than void, we also find that there are public policy reasons supporting this conclusion. First, we have a strong interest in preserving the finality of judgments. Finality produces " 'certainty in the law and public confidence in the system's ability to resolve disputes.' " *Strack v. Pelton*, 70 Ohio St.3d 172, 175 (1994), quoting *Knapp v. Knapp*, 24 Ohio St.3d 141, 144-145 (1986). If delayed attacks such as the appellee's were possible, domestic court decisions would be perpetually open to attack, and finality would be impossible. *In re Hatcher*, 443 Mich. 426, 440 (1993). Second, and more specifically, a declaration that every divorce decree that does not fully comply with Civ.R. 58 is void and null would be "pregnant with fearful consequences." *Bingham v. Miller*, 17 Ohio 445, 448 (1848).

In *Simpkins, supra*, the state moved for resentencing of the defendant before he was released from prison in order to impose statutorily mandated post-release controls. This Court discussed the general rule:

{¶ 12} In general, a void judgment is one that has been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 27. Unlike a void judgment, a voidable judgment is one rendered by a court that has both jurisdiction and authority to act, but the court's judgment is invalid, irregular, or erroneous. *Id.*

{¶ 13} Although we commonly hold that sentencing errors are not jurisdictional and do not necessarily render a judgment void, see *State ex rel. Massie v. Rogers* (1997), 77 Ohio St.3d 449, 450, 674 N.E.2d 1383; *Johnson v. Sacks* (1962), 173 Ohio St. 452, 454, 20 O.O.2d 76, 184 N.E.2d 96 (“The imposition of an erroneous sentence does not deprive the trial court of jurisdiction”), there are exceptions to that general rule. The circumstances in this case—a court's failure to impose a sentence as required by law—present one such exception. (Emphasis supplied.)

The *Simpkins* Court discussed further “exceptions to that general rule,” then held, at ¶ 23:

{¶ 23} A trial court's jurisdiction over a criminal case is limited after it renders judgment, but it retains jurisdiction to correct a void sentence and is authorized to do so. *Cruzado*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, at ¶ 19; *Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, at ¶ 23. Indeed, it has an obligation to do so when its error is apparent. (Emphasis supplied.)

The issue of sentencing errors received further attention by this Court in *State v. Fischer*, 128 Ohio St. 3d 92, 2010-Ohio-6238, which held at the syllabus:

1: A sentence that does not include the statutorily mandated term of postrelease control is void, is not precluded from appellate review by principles of *res judicata*, and may be reviewed at any time, on direct appeal or by collateral attack.

3. Although the doctrine of *res judicata* does not preclude review of a void sentence, *res judicata* still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence.

The procedure for a collateral attack would include a motion to correct an illegal sentence, as this Court stated at ¶25: “It is, however, an appropriate vehicle for raising the claim

that a sentence is facially illegal at any time.” Further, this Court held that the Court of Appeals had the authority to correct the sentencing error itself. “Correcting a defect in a sentence without a remand is an option that has been used in Ohio and elsewhere for years in cases in which the original sentencing court, as here, had no sentencing discretion.” *Id.*, at ¶29.

Finally, in *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, this Court held that “a court errs in imposing court costs without so informing the defendant in court but that the error does not void the defendant’s entire sentence. Instead, upon remand, the trial court must address the defendant’s motion for waiver of payment of court costs.” *Id.*, at ¶1. This Court noted that “[t]he trial court does not act outside of its jurisdiction when it fails to require payment of court costs.” *Id.* at ¶18. *See also, State v. Moore*, 135 Ohio St.3d 151, 2012-Ohio-5479 (reiterating the distinction between imposition of court costs errors as voidable and statutorily mandated sentencing requirements errors as void).

Thus, as is evident from *Simpkins*, *Fischer* and *Joseph*, the trial court retains jurisdiction to correct void and voidable sentences which are then reviewable on direct appeal by the court of appeals. There is no conflict between *Simpkins*, *Fischer* and *Joseph*, and the Court of Appeals decision in this matter as the Court of Appeals confirmed, at ¶ 18, that the trial court retains jurisdiction to vacate a void sentencing entry when it stated that “whether void or voidable, the remedy lies in a direct appeal, not a collateral attack on the judgment in a different court.” (Opinion, ¶18, emphasis supplied). As in *Joseph*, the failure to require payment of court costs is jurisdictionally no different from the alleged failure to properly impose or assess court costs.

More importantly, in the civil context, as in *Miller*, strong public policy considerations fully support the decision below. First, there is a strong interest in preserving the finality of the judgments of the statutory courts. Second, a declaration that every judgment of conviction and

sentence (including the imposition of court costs) originating in a traffic citation in the municipal courts is null and void would be fraught with fearful consequences including the potential near bankruptcy of the municipal court's host municipality.

E. There Is Nothing Novel or Revolutionary About the Lingo Decision; Court Costs Are Not Punishment, But Are More Akin to a Civil Judgment.

There is no authority for the novel issue presented by Appellants and resolved by the Court of Appeals. The dispositive question resolved by the Court of Appeals is whether a common pleas court has subject matter jurisdiction to review the assessment of court costs contained within a judgment of conviction and sentence of a municipal court.

Further to the point, the cases relied upon by Appellants all considered sentencing errors and not the assessment of court costs. In this regard, it is well settled that although costs in criminal cases are assessed at sentencing and are included in the sentencing entry, costs are not punishment, but are more akin to a civil judgment for money. *State v. Joseph*, 125 Ohio St.3d 76, ¶¶18, 20 and 22 (“The trial court does not act outside of its jurisdiction when it fails to require payment of court costs.”); *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 15. As being more akin to a civil judgment for money, it becomes evident that the allegations that court costs were not properly assessed (which allegations were and are denied) questions whether the municipal court's order exceeds statutory authority, but not the municipal court's subject matter jurisdiction. *Joseph, supra* at ¶22 (“The civil nature of the imposition of court costs does not create the taint on the criminal sentence that the failure to inform a defendant of post release control does.”) Accordingly, the Court of Appeals properly held, at ¶18, that “it is well settled that when a judge or judicial officer acts “in excess” of the court's jurisdiction, as opposed to in the absence of all jurisdiction, the act, which is not authorized by law, is voidable, not void.”

Taken to its conclusion (and in its proper context), the Court of Appeals clearly recognized the proposition that a municipal court’s judgment might be voidable on direct appeal if an act with respect to court costs was taken in excess of jurisdiction. The failure to challenge a “voidable” judgment, such as a judgment of sentence and conviction, including the imposition of court costs, on direct appeal constitutes *res judicata*. See *State v. Threatt*, 108 Ohio St.3d 277; *State of Ohio v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 589; *Strongsville v. DeBolt*, 8th Dist. No. 93315, 2009-Ohio-6650; *State v. Brown*, 8th Dist. No. 95048, 2011-Ohio-1096 ; *State v. Walker*, 8th Dist. No. 96305, 2011-Ohio-5270; *State v. McDowell*, 3rd Dist. No. 10-06-34, 2007-Ohio-5486; *State v. Ybarra*, 3rd Dist. No. 120505, 2005-Ohio-4913; *State ex rel Pless v. McMonagle*, 139 Ohio App.3d 503, 2000-Ohio-1965, 744 N.E.2d 274 (8th Dist.); *State v. Hornacky*, 8th Dist. No. 95631, 2011-Ohio-5821; *State v. Zuranski*, 8th Dist. No. 05-LW-2598, 2005-Ohio-3015.

Further, if a municipal court’s judgment was taken in absence of jurisdiction, it might be considered void, but the remedy is patently not a collateral attack in the common pleas court which lacks subject matter jurisdiction to review municipal court orders. As stated previously, the remedy is through a motion to vacate in the trial court followed by a direct appeal of the decision granting or denying the motion to vacate. In fact, Appellants fail to cite a single case allowing for a collateral attack of a municipal court’s judgment of conviction and sentence, including the assessment of court costs, in common pleas court.³

³ Appellant cites to various cases which allow a “void” judgment to be collaterally attacked. Although a party may challenge a void judgment via a “collateral attack,” such collateral attacks are generally mandamus or prohibition petitions brought in a court having superior jurisdiction to the judge of an inferior court who issued the allegedly void order, *see, e.g., State ex rel City of Mayfield Heights v. Bartunek*, 12 Ohio App. 2d 141, 231 N.E.2d 326 (8th Dist. 1967). There is no precedent allowing a court of common pleas to declare void a judgment rendered by a municipal court by a civil declaratory judgment action.

Each case properly relied upon by the Court of Appeals in ¶18 of its decision, *In re JJ*, 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851, *State ex rel. Bell v. Pfeiffer*, 131 Ohio St.3d 114, 2012-Ohio-54, and *Keith v. Bobby*, 117 Ohio St.3d 470, 2008-Ohio-503, 881 N.E.2d 1249, the judgments were found to be “voidable” and reviewable on direct appeal. Appellants have never disputed that errors regarding the imposition of court costs can be challenged by direct appeal. *State ex rel. Galloway v. Lucas County Court of Common Pleas*, 130 Ohio St.3d 206, 207, 2011-Ohio-5259, 957 N.E.2d 11.

Nor will the decision below have “profound implications upon further proceedings in Cuyahoga County.” Criminal defendants will still be able to set aside “void” sentences through the filing of a motion to vacate or a motion to correct a sentence and civil litigants will still be able to set aside void judgments through the filing of Civ. R. 60(B) motions to vacate or common law motions to vacate.

This case merely resolves the issue that Appellants, former criminal defendants and traffic offenders (now masquerading as civil litigants) cannot collaterally attack a municipal court’s judgment of conviction and sentence, including the imposition of court costs, in common pleas court through the use of a purported class action.

F. Absent a Direct Appeal, the Assessment of Court Costs Are Waived and the Issue Is Subject to the Doctrine of *Res Judicata*.

In *State v. Threatt, supra*, this Court held, at ¶3 of the syllabus: “**A sentencing entry is a final appealable order as to costs.**” (emphasis added). In *Threatt*, this Court was asked to examine the certified question of whether collection of costs is permitted against indigent defendants and, if so, what methods of collection are available. In answering the certified question, this Court held, at its syllabus:

costs may be collected from indigent criminal defendants, (2) the state may use any method of collection that is available to collect a civil money judgment as well as the method provided in R.C. 5120.133, **and (3) the appeal time for costs begins to run on the date of the sentencing entry.**

The third syllabus holding in *Threatt*, that the appeal time for the assessment of court costs begins to run on the date of the sentencing entry, was reached only after a careful examination of court cost collection practices similar to the ones under attack in this litigation.

This Court elaborated on those practices:

{¶ 18} ***In order to determine when the appeal time for costs begins to run, we must determine what constitutes a final appealable order for costs assessed under R.C. 2947.23.***

{¶ 19} In all criminal cases, costs must be included in the sentencing entry. R.C. 2947.23(A). The clerk of courts is responsible for generating an itemized bill of the court costs. R.C. 2949.14. However, even if the itemized bill is ready at the time of sentencing, "the specific amount due is generally not put into a judgment entry." *State v. Glosser*, 157 Ohio App.3d 588, 2004-Ohio-2966, 813 N.E.2d 1, ¶ 27 (Edwards, J., concurring). ***Therefore, a typical sentencing entry, like the one that sentenced Threatt, assesses only unspecified costs, with the itemized bill to be generated at a later date.*** Accordingly, we must determine whether a sentencing entry that assesses costs without specifying the amount of those costs lacks finality.

{¶ 21} Pursuant to R.C. 2947.23, it is undisputed that trial courts have authority to assess costs against convicted criminal defendants. When a court assesses unspecified costs, the only issue to be resolved is the calculation of those costs and creation of the bill. Calculating a bill for the costs in a criminal case is merely a ministerial task. ***Therefore, we hold that failing to specify the amount of costs assessed in a sentencing entry does not defeat the finality of the sentencing entry as to costs.*** See *State v. Slater*, Scioto App. No. 01CA2806, 2002-Ohio-5343, 2002 WL 31194337, ¶ 5, fn. 3.

Because the sentencing entry constitutes a final appealable order, this Court held further:

an indigent defendant must move a trial court to waive payment of costs at the time of sentencing. If the defendant makes such a motion, then the issue is

preserved for appeal and will be reviewed under an abuse-of-discretion standard. *Otherwise, the issue is waived and costs are res judicata.*

Failure to object at sentencing or to file a timely notice of appeal constitutes waiver and, according to this Court, the costs are *res judicata*.

Moreover, in *State of Ohio v. Clevenger, supra*, this Court reaffirmed the principal that a defendant may move to waive court costs before a trial court and preserve the issue for appeal. *Clevenger*, at ¶5, quoting *Threatt, supra* at ¶23. The defendant in *Clevenger* did file a motion to suspend payment of costs and attached an affidavit attesting to his financial status. *Clevenger*, at ¶2. However, this was not done either at the time of original sentencing or at the subsequent hearing on a probation violation. *Id.*, at ¶6. This Court concluded “**The costs assessed against him, therefore, are res judicata.**” *Id.*, at ¶6 (emphasis added).

The Municipal Court’s order assessing court costs are not properly challenged in the Common Pleas Court, which lacks subject matter jurisdiction, and the failure to challenge the assessment of court costs through the appeal process constitutes *res judicata* and prevents this class action collateral attack. The Berea Municipal Court had jurisdiction over the underlying charges against Appellant Glick. The Berea Municipal Court was established by R.C. §1901.01(A). The Berea Municipal Court has jurisdiction within the municipal corporation of Middleburg Heights. R.C. §1901.02(B). Finally, the Berea Municipal Court has subject matter jurisdiction over the violation of any ordinance of any municipal corporation within its territory and the violation of any misdemeanor within its territory. R.C. §1901.20(A)(1). Appellant Glick was pulled over in Middleburg Heights and issued a citation under Middleburg Heights municipal ordinances. Jurisdiction could not be more clear.

**CROSS-PROPOSITIONS OF LAW
TO PRESERVE THE JUDGMENT BELOW**

I. A Municipal Court Has Wide Discretion to Assess Court Costs Pursuant to Relevant Statutes and Local Rules.

The Trial Court held that Appellee improperly charged costs on dismissed counts, improperly charged general court costs on a per charge basis, and improperly charged offenders a processing fee when they pay their costs in cash. (R. 141, ¶s 50-52, 55 and 56). None of these findings or conclusions is supported by the record. In denying Appellee’s motion for summary judgment, the Trial Court also found that these costs were improperly charged on the dismissed lanes violation count. (R. 141, ¶45). Again, the Trial Court’s analysis misses the mark as the lanes violation charge was dismissed at Appellant Glick’s cost pursuant to a plea agreement.

A review of the certified record before the Berea Municipal Court reveals that all entries and case notations on the docket and case jacket fully conform with applicable rules,⁴ statutes and case law. (R. 93, Exh. 1 & 2). The issuing citation and case jacket are in complete compliance with the Traffic Rules. *See*, Traffic R. 2, Appendix. The case jacket and the certified docket reveal that the DUI charge was amended to a reckless operation charge to which Appellant Glick pled guilty. The notation on the case jacket of the DUI charge reveals that costs were assessed to Appellant Glick. The case jacket also reveals the following notation for the lanes violation charge: “Dism @ Δ’s” cost, with Judge Comstock’s initials next to the entry on the case jacket. Likewise, the docket unequivocally states that the lanes violation charge was “Dismissed at Def. Costs.” Following the plea agreement, the sentencing entry, docket and case

⁴The Rules of Superintendence for the Courts of Ohio (“Superintendence Rules”) demonstrate that separate charges are considered separate cases and that the numbering of cases is simply a matter of administrative convenience. *See* Rules 37 and 43 of the Superintendence Rules as well as the commentary.

jacket reveal that costs were assessed against Appellant Glick on both charges in conformance with the standard practice approved by the Ohio Supreme Court in *Threatt, supra*. See Docket Entries dated 12/09/06 and 04/15/05. (R. 93, Exh. 1 and 2).

In *City of Middleburg Heights, v. Quinones*, 120 Ohio St.3d 534, 2008-Ohio-6811, 900 N.E.2d 1005, this Court confirmed that special project fees assessed under R.C. §1901.26 may be charged on a per charge basis, rather than a per case basis. In *Quinones*, as is similar to the present case, Quinones was charged with and found guilty in one case of four separate charges, which were later reduced on appeal to convictions on two charges. *Id.*, ¶2-3. Berea Municipal Court costs authorized by R.C. §1901.26(B) were imposed on a per charge basis. This Court observed that “the General Assembly has specifically vested the judges of the municipal courts with authority to impose special-project fees in addition to court costs.” *Id.*, ¶10. This Court further held that “R.C. 1901.26(B) authorizes municipal courts to charge a special project fee in addition to all other court costs on the filing of *each criminal cause*.” *Id.*, ¶3 syllabus.

Court costs are referenced in Berea Municipal Court Local Rule 5(A) which provides that the Schedule of Costs is to be established from time to time by the Berea Municipal Court and posted in a conspicuous location in the Offices of the Clerk of Court. At all times relevant hereto, the Schedule of Costs is also placed on the Berea Municipal Court’s web site located at www.bereamunicourt.org. At the time the charges were brought against Appellant Glick, the Berea Municipal Court had established the Schedule of Costs pursuant to Journal Entry. See Affidavit of Raymond J. Wohl, attached to and in support of Defendant’s Motion for Summary Judgment, (R. 77, Tab 1, Exhibits A1-A11). Further, pursuant to Ohio statutes and Local Rule 5, the Schedule of Costs was and is posted in a conspicuous location in the Offices of the Clerk of Court and on the website noted above. *Id.*, Tab 1, Exhibit B.

The *Quinones* decision confirms and validates the practice and procedure of the Berea Municipal Court which charges and assesses special project fees on a per charge or per cause basis. Nonetheless, the Trial Court found that the Clerk of Court could not charge “general court costs” on a per charge basis. (R. 141, ¶50). There is no authority for this decision. First, this Court in *Quinones* recognized:

R.C. 2947.23(A)(1) imposes a mandatory obligation on trial judges in all criminal cases to include in the sentence the costs of prosecution and to render a judgment therefor. It does not specifically authorize imposition of these costs for each offense committed. This interpretation conforms to the legislature's purpose in imposing court costs on a defendant convicted of a crime-to finance the court system, not to punish the defendant additionally on each charge. *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, at ¶ 15; *Strattman v. Studt* (1969), 20 Ohio St.2d 95, 102, 49 O.O.2d 428, 253 N.E.2d 749.

This Court did not hold that “general court costs” could not be assessed for each offense.⁵ There is nothing in the record which would indicate that general court costs are used to do anything other than to finance the court system. General court costs in fact are used to finance the court system. Moreover, there is nothing in the record which would indicate that the “general court costs” referred to by the Trial Court are in fact punishment for the additional charges. Rather, these court costs are assessed per charge because each charge must be separately entered into the Berea Municipal Court’s computerized docketing system, tracked through the CourtMaster 2000 software and manually on each charges case jacket, and reported as a separate case pursuant to the Rules of Superintendence. *See* Affidavit of Colleen Coyne, attached to

⁵In partial response to *Quinones*, House Bill No. 247 of the 129th General Assembly, effective March 22, 2013 amended Ohio Rev. Code §2947.23 by adding a new subsection (D)(1) now provides:

“Case” means a prosecution of all the charges that result from the same act, transaction, or series of acts or transactions and that are given the same case type designator and case number under Rule 43 of the Rules of Superintendence for the Courts of Ohio or any successor to that rule.

Consolidated Reply Brief. (R. 104, Tab K). Thus, each charge is treated as a separate case and, as reported by the Joint Committee, taxes the time and resources of the clerks.

Finally, this Court, in *Quinones*, defined “costs of prosecution,” which are charged in a “case,” as follows:

Costs, in the sense the word is generally used in this state, may be defined as being the statutory fees to which officers, witnesses, jurors, and others are entitled for their services in an action or prosecution, and which the statutes authorize to be taxed and included in the judgment or sentence." See also *State v. Perz*, 173 Ohio App.3d 99, 2007-Ohio-3962, 877 N.E.2d 702, at ¶ 36, 42 (holding that costs of prosecution are those expenses directly related to the court proceeding and remanding for the trial court to determine "the actual costs of prosecution"); *State v. Christy*, Wyandot App. No. 16-04-04, 2004-Ohio-6963, 2004 WL 2940888, at ¶ 22 ("The expenses which may be taxed as costs in a criminal case are those directly related to the court proceedings and are identified by a specific statutory authorization"); *State v. Holmes*, Lucas App. No. L-01-1459, 2002-Ohio-6185, 2002 WL 31521456, at ¶ 20 ("The ‘costs of prosecution’ * * * are the court costs incurred in the prosecution of the case").

The “costs of prosecution” are clearly set forth in each Journal Entry signed by the Municipal Court, are charged once per case, and include such things as bailiff fees, bond, capias, jury summons, probation, record search, subpoenas, and many others costs. (R. 77, tab 1, exhibits A1-A11.) Therefore, the “costs of prosecution,” which were charged per case, are distinguishable from “general court costs.” Each are readily and easily identified in the Journal Entries signed by the Municipal Court and assessed in accordance with the applicable Journal Entry by the Clerk of Court.

Appellant Glick claims, and the Trial Court so found, that he was improperly charged court costs on the charge of lanes violations which was dismissed by the Prosecutor. Appellant conceded however at his deposition that such dismissal was part of a voluntary plea agreement. See Glick Depo. at 17. (Glick Deposition is attached at Tab A to the Consolidated Brief on Summary Judgment, R. 104.) Mr. Glick was represented by Attorney Martinez, who, outside of

Mr. Glick's presence but with his authority, negotiated the plea agreement with the Middleburg Heights City Prosecutor. *Id.* at 17-18. Mr. Glick understood at the time he entered into the plea agreement that he would be required to pay court costs. *Id.* However, Mr. Glick had no idea how much the court costs would be and he made no effort to find out prior to entering the plea. *Id.*

Appellants also conceded that court costs may be assessed against a defendant pursuant to a validly entered plea agreement, even on a charge that was dismissed. *See* Cross Motion at 8-10 (R. 93). Numerous cases support this very proposition. *See City of Cleveland v. Tighe*, 8th Dist. No. 81767, 2003-Ohio-1845; *City of Willoughby v. Sapina*, 11th Dist. No. 2000-L-138, 2001-Ohio-8707; *State v. Kortum*, 12th Dist. No. CA2001-04-034, 2002-Ohio-613; *City of Cuyahoga Falls v. Coup-Peterson*, 124 Ohio App.3d 716, 707 N.E.2d 545 (9th Dist.); ; *City of Cleveland Heights v. Machlup*, 8th Dist. No. 93086, 2009-Ohio-6468.

Further, there has never been a requirement in Ohio law that an individual must affirmatively agree to accept such costs as part of a "plea agreement memorialized in a valid journal entry," as required by the Trial Court's class certification determination. (R. 141, ¶60). Pleas are made orally. Crim. R. 11(A). In fact, it is well settled that a plea bargain is a contract and is governed by contract law principles and standards. *State v. Butts*, 112 Ohio App.3d 683, 686, 679 N.E.2d 1170 (8th Dist.); *State v. Brooks*, 2nd Dist. No. 2010 CA 48, 2011-Ohio-3722.

In a misdemeanor case involving a serious offense, the plea of guilt or no contest shall not be accepted by the court without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Crim. R. 11(D). As previously discussed, court costs are not computed at the time of taking the plea. In the present case, the Trial Court's decision

turns long established practice of accepting a plea agreement upside down by imposing requirements never before required. Rather, Ohio courts have repeatedly upheld plea agreements that are knowingly, intelligently and voluntarily entered into. *State v. Spates*, 64 Ohio St.3d 269, 595 N.E.2d 351 (1992); *State v. Jackson*, 8th Dist. No. 86506, 2006-Ohio-3165.

Even if he were improperly charged court costs, a point not at all conceded by Appellee, Appellant had the right to take an immediate appeal prior to paying those costs. *See, also, Threatt, supra*. Further, Appellant could have moved to withdraw his plea under Crim. R. 32.1. Appellant neither appealed nor moved to withdraw his plea. As a result, his claims are barred by the doctrine of *res judicata*. *Threatt, supra*. Even if Appellant wishes to withdraw his plea, it is his burden of proof to demonstrate that the plea agreement was not entered into knowingly, intelligently and voluntarily. *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one syllabus.

Finally, the Trial Court's order to refund the processing fee when paying court costs in cash misses the mark. The processing fee is paid by everyone paying court costs in order to offset the Municipal Court's banking costs. At his deposition, Mr. Wohl did not know whether it was charged solely for defendants who pay with cash. (*Id.*) It is not; it is paid by everyone.

II. A Clerk of Court of a Municipal Court Has Both Judicial and Statutory Immunity with Respect to the Assessment of Court Costs.

"It is well-established under Ohio law that court clerks...have absolute immunity against suits arising out of the performance of judicial or quasi-judicial activities." *Inghram v. City of Sheffield Lake*, 8th Dist. No. 69302, 1996 WL 100843, at *3 (Mar. 7, 1996), citing *Kelly v. Whiting*, 17 Ohio St.3d 91, 93-94, 477 N.E.2d 1123 (1985); *Baker v. Court of Common Pleas of Cuyahoga County*, 61 Ohio App.3d 59, 64, 572 N.E.2d 155 (8th Dist. 1989) (further citations

omitted). The reason that judicial immunity extends to a court clerk is because a clerk merely acts at a court's directive. *Kelly, supra* at 93.

Based upon this, Appellee should have been dismissed from this class action. All court costs collected by the Clerk at issue in this matter were collected pursuant to statutes, local rule and court order. This Court has held that the imposition of costs under R.C. §§2743.70 and 2949.091 are within a judge's judicial capacity and therefore judicial immunity applies. *State ex rel. Fisher v. Burkhardt*, 66 Ohio St.3d 189, 191, 1993-Ohio-187, 610 N.E.2d 999 ("One of a judge's functions is to interpret the law in matters over which the judge has jurisdiction."). This Court held, at 191:

While we find that the court does have a mandatory duty to collect and transmit court costs to the state in bond forfeiture cases pursuant to R.C. 2743.70(B) and 2949.091(B), appellee cannot be held civilly liable for his interpretation to the contrary, since appellee was acting in his capacity as a judge who had the duty to interpret the statutes and establish court cost schedules in traffic offenses which would come to his court.

Therefore, such immunity applies even if the interpretation of a statute was not only incorrect, but voidable as taken in excess of a court's jurisdiction. *Id.* at 192. So long as the judge possessed proper jurisdiction of the underlying subject matter of the case, there is no civil liability for actions taken pursuant to judicial capacity. *Id.* at 191.

More recently, this Court held, in *Borkowski v. Abood*, 117 Ohio St.3d 347, 2008-Ohio-857, 884 N.E.2d 7, ¶1 of syllabus:

When a judge acts in an official judicial capacity and has personal and subject-matter jurisdiction over a controversy, the judge is exempt from civil liability even if the judge goes beyond, or exceeds, the judge's authority and acts in excess of jurisdiction. Civil liability attaches only if the judge acts in an absence of all jurisdiction. (*Wilson v. Neu* (1984), 12 Ohio St.3d 102, 12 OBR 147, 465 N.E.2d 854, followed.)

This judicial immunity extends to the Berea Clerk of Court. The office of a clerk of court is a function mandated by the general assembly. *State v. Darulis*, 9th Dist. No. 19331, 1999 WL 420296, at *4 (Jun. 23, 1999), citing R.C. §1901.31, *et seq.* Operation of a clerk’s office is not a proprietary function of government. *Id.* Any liability imposed upon the Appellee must be specifically imposed by statute or be the result of the Clerk’s acts being manifestly outside the scope of his employment or be the result of his acts being performed with malicious purpose, bad faith or wanton recklessness. *Id.* None of these exceptions to immunity apply. Rather, the Appellee merely collected court costs and fees at the directive of the Berea Municipal Court pursuant to lawful statutes and court order. Accordingly, Appellee is entitled to summary judgment as all of the Clerk’s acts at issue in this matter are immune from liability.

In *Lambert v. Clancy*, 125 Ohio St.3d 231, 2010-Ohio-1483, 927 N.E.2d 585, syllabus, in an action brought against the Hamilton County Clerk of Court, this Court recently held:

When the allegations contained in a complaint are directed against an office of a political subdivision, the officeholder named as a defendant is sued in his or her official capacity, rather than in his or her individual or personal capacity.

The political-subdivision-immunity analysis set forth in R.C. 2774.02 [sic] applies to lawsuits in which the named defendant holds an elected office within a political subdivision and that officeholder is sued in his or her official capacity.

This Court explained, in pertinent part:

{¶ 8} R.C. Chapter 2744 was enacted in 1985 and addresses when political subdivisions, their departments and agencies, and their employees are immune from liability for their actions. Determining whether a political subdivision is immune from liability under R.C. 2744.02, as this court has frequently stated, involves a three-tiered analysis. *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, ¶ 10; *Greene Cty. Agricultural Soc. v. Liming* (2000), 89 Ohio St.3d 551, 556, 733 N.E.2d 1141. A general grant of immunity is provided within the first tier, which states that “a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.” R.C. 2744.02(A)(1).

{¶ 9} The second tier in the immunity analysis focuses on the five exceptions to this immunity, which are listed in R.C. 2744.02(B). *Elston*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, ¶ 11. If any of the exceptions to immunity are applicable, thereby exposing the political subdivision to liability, the third tier of the analysis assesses whether any of the defenses to liability contained in R.C. 2744.03 apply to reinstate immunity. *Id.* at ¶ 12.

In the present case, the allegations of the amended complaint are clearly directed against the clerk of court's office. Therefore, Appellee is named as a defendant in his official capacity. The political subdivision immunity analysis set forth in R.C. §2744.02 applies. None of the exceptions set forth in R.C. §2744.02(B) apply. Even if an exception applied, R.C. §2744.03(A) would restore immunity.

While calculating a cost bill is a ministerial task, *see Threatt, supra*, carrying out a court's judgment entries is a judicial or quasi-judicial activity entitling the Appellee to judicial immunity. Clearly, Appellee has judicial and statutory immunity in matters involving the Berea Municipal Court's interpretation of the statutes and journal entries in question. *State ex rel. Fisher v. Burkhardt*, 66 Ohio St.3d at 191.

In denying Appellee's motion for summary judgment, the Trial Court agreed that judicial immunity protects a clerk of court to the extent that the clerk is acting at the Court's directive. (R. 141, ¶46). However, the Trial Court incorrectly found that Appellee is collecting costs without a specific order because he collected costs on the dismissed (weaving) charge. *Id.* Again, this argument ignores the undisputed evidence that the weaving charge was dismissed at Appellant Glick's cost pursuant to a plea agreement.

Moreover, the Trial Court erred in finding that Appellant's claims for restitution falls within the injunctive relief exception described in *Pulliam v. Allen*, 466 U.S. 522, 104 S. Ct. 1970 (1984). The injunctive relief exception has no application here as none of the class

members are complaining about being incarcerated for failing to make bond on a non-jailable misdemeanor offense.

III. The Equitable Doctrines of Payment and Release Bars a Traffic Offender from Challenging the Assessment of Court Costs after Such Costs Have Been Paid.

To establish a claim for restitution, Appellants must demonstrate "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment ('unjust enrichment')." *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984). In the present case, Appellants' claims are barred by their respective voluntary payment of the court costs in satisfaction of the individual plea agreements. The Trial Court never even addressed this issue in its decision.

While the burden of proof of payment is unquestionably upon Appellee, it cannot be disputed that Appellant voluntarily paid the court costs assessed in order to reduce the charges against him and finally, and conclusively, resolve the underlying traffic offenses. First, the case jacket to Mr. Glick's traffic citation clearly reflects that Judge Comstock entered an order dismissing the reckless operation charge by noting: "Dism @ Δ's" cost. Appellant Glick testified that he understood he would be required to pay court costs as part of his plea bargain.

Q. Prior to accepting the plea agreement, did you understand that you would be required to pay court costs?

A. Yes.

Q. Did you have an understanding of how much court costs you would have to pay prior to entering the plea?

A. No idea at all.

(R. 104 at Tab A, page 18). As previously stated, it is Appellant's burden to prove that the plea bargain should be set aside. *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977),

paragraph one syllabus. Because Mr. Glick agreed to pay court costs as part of a plea bargain, Mr. Glick bears the burden of proving that the plea bargain is invalid. *Smith, supra*. This he failed to do.

IV. A Traffic Offender Has an Adequate Remedy at Law by Way of an Appeal to Contest the Assessment of Court Costs.

It is well settled that an injunction will not issue where there is an adequate remedy at law. *See Mid-America Tire, Inc. v. PTZ Trading Ltd.*, 95 Ohio St.3d 367, 2002-Ohio-2427, 768 N.E.2d 619; *Haig v. Ohio State Bd. of Edn.*, 62 Ohio St.3d 507, 584 N.E.2d 704 (1992); *Garono v. State*, 37 Ohio St.3d 171, 173, 524 N.E.2d 506 (1988); *Salem Iron Co. v. Hyland*, 74 Ohio St. 160, 166, 77 N.E. 751 (1906). It is a general rule that a court of equity will not interfere by injunction to prevent the enforcement of criminal statutes at the instance of an alleged law violator. *Troy Amusement Co. v. Attenweliler*, 137 Ohio St. 460, 30 N.E.2d 808 (1940), citing 1 High on Injunctions (4 Ed.), 85, Section 68.

Each member of the purported class action had, or has, an adequate remedy at law by way of an appeal. R.C. §2505.03; *Collins v. State of Ohio*, 8th Dist. No. 97111, 2011-Ohio-4964; *State ex rel. Pless, supra*; *Henderson v. State of Ohio*, 8th Dist. No. 97042, 2011-Ohio-5679. Because all members of the class, including Appellants, have adequate remedies at law, their claim for injunctive relief should have been denied.

Instead, the Trial Court found that “this type of procedure [an appeal] would be an inefficient use of court resources when compared to an injunction issued by this Court.” (R. 141, ¶55). There is absolutely no authority to suggest that a direct appeal to a court of appeals from a decision of a municipal court is inadequate. Instead, it is well settled that “any error regarding the imposition of court costs can be challenged by appeal.” *State ex rel Galloway v. Lucas County Court of Common Pleas*, 130 Ohio St.3d 206, 207, 2011-Ohio-5259, 957 N.E.2d 11

citing *State ex rel Whittenberger v. Clarke*, 89 Ohio St.3d 207, 208, 2000-Ohio-136, 729 N.E.2d 756. Nor is there any authority for the decision that injunctive relief issued by a common pleas court against a municipal clerk of court is a more efficient use of court resources than a direct appeal, particularly now that every single case since 1995 must be reviewed pursuant to the Trial Court's class certification decision.

V. A Traffic Offender's Claims are Moot once He Has Paid Court Costs Assessed by a Municipal Court.

It is a well-established principle of law that satisfaction of a judgment renders an appeal from that judgment moot. *Blodgett v. Blodgett*, 49 Ohio St.3d 243, 245, 551 N.E.2d 1268 (1990). "Where the court rendering judgment has jurisdiction of the subject-matter of the action and of the parties, and fraud has not intervened, and the judgment is voluntarily paid and satisfied, such payment puts an end to the controversy, and takes away * * * the right to appeal or prosecute error or even to move for vacation of judgment." *Rauch v. Noble*, 169 Ohio St. 314, 316, 159 N.E.2d 451 (1959). And, if an appellant neglects to obtain a stay of the judgment, the non-appealing party has the right to attempt to obtain satisfaction of the judgment even though the appeal is pending. When "the non-appealing party is successful in obtaining satisfaction of the judgment, the appeal must be dismissed because the issues raised in the appeal have become moot." *Hagood v. Gail*, 105 Ohio App.3d 780, 785, 664 N.E.2d 1373 (11th Dist. 1995).

Consequently, a court will generally not resolve a moot controversy. Controversy has been defined "[a] disagreement or dispute." Black's Law Dictionary (8 Ed. Rev. 2004) 354. A "controversy" can include many aspects and consist of several controversies. *Stratso v. Song*, 17 Ohio App.3d 39, 42, 477 N.E.2d 1176 (10th Dist. 1984). "A moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter

which, when rendered, for any reason cannot have any practical legal effect upon a then-existing controversy.” *Culver v. City of Warren*, 84 Ohio App. 373, 393, 616 N.E.2d 1152 (3rd Dist. 1994).

In the present case, all Appellants herein were convicted of various traffic offenses, assessed court costs and voluntarily paid such court costs. Any claim or controversy arising from these facts, or any decision in advance about a right before it has been actually asserted or contested by prospective class members, is moot.

VI. A Plaintiff May Not Defeat a Motion for Summary Judgment by Raising Claims that Were Not Properly Pled.

It is well settled that a Plaintiff may not successfully prevent summary judgment by raising new theories of recovery in its reply opposing summary judgment. *Stadium Lincoln-Mercury, Inc. v. Heritage Transport*, 160 Ohio App.3d 128, ¶35, 2005-Ohio-1328, 826 N.E.2d 332 (7th Dist.); *White v. Mount Carmel Med. Ctr.*, 150 Ohio App.3d 316, 326-27, 2002-Ohio-6446, 780 N.E.2d 1054 (10th Dist.). To hold otherwise would create an injustice and be unfair to the opposing party because it would not have had fair notice of the claim and an opportunity to prepare a response or conduct discovery. *Stadium-Lincoln, supra*.

This case fits squarely within the precedent cited above. In *White, supra*, the Court of Appeals affirmed a summary judgment in favor of the defendant noting that the Plaintiff could not rely on new theories in support of a retaliation claim which were raised for the first time in an opposition brief to a motion for summary judgment. In *Stadium-Lincoln, supra*, the Court of Appeals affirmed a summary judgment in favor of the defendant holding that “Heritage cannot use the unpleaded claim of breach of good faith and fair dealings to insulate itself from summary judgment on its breach of contract claim.” *Id.* at ¶20. And, in *Scassa, supra*, the Court of Appeals affirmed summary judgment for the defendant holding that, in a general negligence suit,

plaintiff may not rely on un-pled claims of negligent maintenance, negligent failure to warn and negligent entrustment to survive a motion for summary judgment.

As in the above cases, it was error for the Trial Court to allow Appellants to rely in opposition to Appellee's Motion for Summary Judgment on un-pled causes of action or even un-pled theories such as the alleged claims for improper "journalization of court costs," improper "imposition of costs without convictions," and improper imposition of "special projects costs." Further, Appellants could not obtain summary judgment on these same un-pled causes of action or theories.

VII. A Common Pleas Court May Not Certify a Class Action to Review the Assessment of Court Costs by a Municipal Court.

A. Introduction

It is well settled that the party seeking to maintain a class action has the burden of demonstrating that all factual and legal prerequisites to class certification have been met. *Gannon v. City of Cleveland*, 13 Ohio App.3d 334, 335, 469 N.E.2d 1045 (8th Dist. 1984). A class action may be certified only if the court finds, after a rigorous analysis, that the moving party has satisfied all the requirements of Civ. R. 23. *Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 67, 70, 1998-Ohio-365, 694 N.E.2d 442.

In *Hamilton, supra* at 67, this Court set forth the standard of review of decisions certifying a class action:

A trial judge has broad discretion in determining whether a class action may be maintained and that determination will not be disturbed absent a showing of an abuse of discretion. * * * However, the trial court's discretion in deciding whether to certify a class action is not unlimited, and indeed is bounded by and must be exercised within the framework of Civ.R. 23. The trial court is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied.

Accord Marks v. C.P. Chem. Co., Inc., 31 Ohio St.3d 200, 509 N.E.2d 1249 (1987), syllabus (“A trial judge has broad discretion in determining whether a class action may be maintained and that determination will not be disturbed absent a showing of an abuse of discretion.”); *Ojalvo v. Bd. of Trustees of Ohio State Univ.*, 12 Ohio St.3d 230, 466 N.E.2d 875 (1984) (applying abuse of discretion standard.)

There are seven requirements that must be satisfied before a case may be maintained as a class action: (1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ. R. 23(B) requirements must be satisfied. *See Hamilton*, 82 Ohio St.3d 67, 79.

B. A Trial Court May Not Redefine a Class without Affording the Parties the Opportunity to Present and Argue the Merits of the Alternative Class Definition

The Trial Court correctly found that the class definitions (as well as the proposed amended class definition and alternative class definitions) proposed by Appellant were improper. The Trial Court, nevertheless, impermissibly amended the class definition and certified its own amended definition without affording the parties the opportunity to brief the issue of whether the Trial Court’s amended definition was proper and should be certified by the Trial Court.

The Trial Court relied on this Court’s decision in *Stammco, L.L.C. v. United Telephone Co. of Ohio*, 125 Ohio St. 3d 91, 2010-Ohio-1042 as support for its decision to unilaterally amend the class definition and certify its own amended definition of the class. However, a full

reading of *Stammco* demonstrates that the Trial Court abused its discretion by certifying its own amended class definition without affording the parties an opportunity to brief the issue of whether the Trial Court's amended class definition was proper. In *Stammco*, this Court wrote:

Unlike the class in *Hamilton*, the class here cannot be ascertained merely by looking at appellants' records. While it appears that the class is intended to consist only of customers who received unauthorized charges, the class definition prevents the class members from being identified without expending more than a reasonable effort. We conclude that a class action cannot be maintained under Civ. R. 23 using the class definition as stated and that the trial court abused its discretion in certifying the class as so defined.

Rather than attempt to redefine the class ourselves, we remand the case to the trial court to do so, for two reasons. First, the parties did not have the opportunity to present and argue the merits of alternative class definitions in their briefs before us. Second, the trial judge who conducts the class action and manages the case must be allowed to craft the definition with the parties.

Stammco, 125 Ohio St. 3d at 95 (emphasis added). Although case law is clear that a trial court enjoys broad discretion as to whether to certify a class action, Appellee respectfully submits that the Trial Court in the instant matter abused its discretion by rejecting Appellant's various proposed class definitions and unilaterally crafting its own class definition without affording the parties the opportunity to brief the merits of certifying the class as newly defined by the Trial Court.

C. A Class Is Not Identifiable Where It Would Require an Individualized Inquiry into Every Case Where Court Costs Were Paid

The Trial Court erroneously determined that its amended class definition "is very specific" and the "proposed class members will be readily identifiable." (R. 141, ¶61). In *Hamilton*, 82 Ohio St.3d 67, this Court reaffirmed the implicit identification requirement for certification of a class action:

"The requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member" 7A Charles Alan

Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* (2 Ed. 1986) 120-121, Section 1760. Thus, the class definition must be precise enough “to permit identification within a reasonable effort.” *Warner v. Waste Mgt., Inc.*, (1988), 36 Ohio St. 3d 91, 96, 521 N.E.2d at 1091.

The Trial Court abused its discretion by crafting an amended class definition that is not precise enough to permit identification within a reasonable effort. The amended definition certified by the Trial Court will require an individualized inquiry into every criminal and/or traffic case before the Berea Municipal Court since 1995. First, there would need to be an identification of every person who paid “General Court Costs” on a “per offense” instead of a “per case” basis. Second, there would need to be a determination as to whether any defendants paid costs in connection with offenses that did not result in a conviction. For each of these individuals, there would need to be an individualized inquiry as to whether these individuals paid said court costs as part of a valid plea agreement memorialized in a journal entry. This inquiry would not only be administratively infeasible, but likely impossible, as plea agreements are read into the record and, therefore, there would need to be a review of the transcripts for each of these individual cases, to the extent said transcripts were ever prepared or are even still available. Lastly, there would need to be an individualized inquiry to determine whether each individual was assessed a “processing fee” and whether said individuals paid their court costs in cash.

Appellant failed to specify the means “to determine whether a particular individual is a member of the class” and the Trial Court recognized this deficiency when it rejected Appellant’s various proposed class definitions. *Hamilton*, 82 Ohio St. 3d at 71-72. However, the Trial Court then abused its discretion by crafting its own definition which is still not “sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.” *Stammco*, 125 Ohio St. 3d at 93-94. It was Appellant’s burden to appropriately define the class and specify the means to determine whether a particular individual is a member

of the class. Appellant failed to specify any means whatsoever to identify the members of the class it proffered and the Trial Court abused its discretion by creating its own class definition that still fails to meet the administrative feasibility requirement.

D. A Plaintiff Fails to Establish the Numerosity Requirement Where the Claim Is Based on Mere Speculation as to the Numbers of Class Members

Under the numerosity requirement “one or more members of a class may sue or be sued as representative parties on behalf of all only if *** the class is so numerous that joinder of all members is impracticable * * * .” Civ. R. 23(A).

As set forth above, it was Appellant’s burden to establish each of the elements of Civ. R. 23 including, without limitation, the numerosity requirement. The only purported factual support whatsoever Appellant set forth in the Motion for Class Certification on the issue of numerosity was the following four line paragraph:

The numerosity requirement is easily satisfied in this instance. Even if only a handful of statutory courts have been imposing court costs upon unwitting defendants on a “per offense” instead of a “per case” basis, thousands of class members will be entitled to a refund. It is doubtful that the Named Plaintiffs were the only individuals who were duped in this manner.

(R. 11, at p. 8). The Trial Court should not have condoned or engaged in Appellant’s request to speculate about the number of putative class members. Rather than rejecting Appellant’s request for speculation, however, the Trial Court engaged in its own speculation to support a finding that the class met the numerosity requirement. Specifically, the Trial Court stated in its decision, “Although the Court has not been provided with a number for how many offenders are charged costs in the Berea Municipal Court, based on Defendant’s statement, this Court finds that the Class is likely to contain hundreds, if not thousands, of individuals over the defined time period.” (R. 141, ¶63).

The truth of the matter is that Appellant was unable to demonstrate that there is even one member of the putative class because, as set forth above, all of the class members' claims are barred by the doctrine of *res judicata*. Nevertheless, the number of class members was purely speculative on Appellant's part as it was for the Trial Court. Accordingly, the Trial Court erred in finding that Appellant met his burden of demonstrating that the class is so numerous that joinder is impracticable.

E. A Plaintiff Fails to Meet the Commonality and Typicality Requirements Where He Has Affirmatively Agreed to Accept the Court Cost Charges as Part of a Valid Plea Agreement

The Eighth District Court of Appeals stated in *Piro, supra*:

The requirement of "questions of law or fact common to the class" is met where there is a common nucleus of operative facts, or a common liability issue. *Marks, supra*, 31 Ohio St.3d at 202, 509 N.E.2d at 1252-1253; *Warner, supra*, 36 Ohio St.3d 91, 521 N.E.2d 1091, paragraph three of the syllabus.

Where the claims arise from a defendant's same course of conduct and are based on a common legal theory, there are questions of law or fact common to the class as required under Civ. R. 23. The typicality element is satisfied where the interests of the representatives do not conflict with the interests of the class. *Piro, supra* (The requirement of typicality is met where there is no express conflict between the class representatives and the class.)

Simply put, because Appellant affirmatively agreed to accept the court cost charges as part of a valid plea agreement, Appellant is exempted from subpart B of the Trial Court's amended class definition. Moreover, each and every member of the class would have their own individualized reasons for accepting a plea agreement and paying court costs so that no plea agreement could be common or typical to another. Therefore, Appellant failed to meet the commonality and typicality elements because his claimed injury (which is non-existent) is not typical of the class members.

F. A Plaintiff Fails to Meet Civ. R. 23(B)(2) Right to Injunctive Relief Because Each Class Member Had a Right to Appeal and, Therefore, an Adequate Remedy at Law Exists for Each Class Member

In addition to the Civ. R. 23(A) requirements, Appellant was required to satisfy one of the Civ. R. 23(B) requirements before the Trial Court could certify the matter as a class action. *Hamilton*, 82 Ohio St. 3d 67, 79. The Trial Court certified its amended class definition under both Civ. R. 23(B)(2) and 23 (B)(3). Rule 23(B)(2) of the Ohio Rules of Civil Procedure provides in relevant part:

The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

The Trial Court erred in certifying the amended class definition under Civ. R. 23(B)(2) because each class member had an adequate remedy at law by way of an appeal. *See* R.C. § 2505.03. Because an adequate remedy at law existed or exists for each member of the amended class, the Trial Court erred in issuing an injunction. *See Mid-America Tire, Inc. v. PTZ Trading Ltd.*, 95 Ohio St.3d 367, 2002-Ohio-2427, 768 N.E.2d 619; *Haig v. Ohio State Bd. of Edn.*, 62 Ohio St.3d 507, 510, 583 N.E.2d 700 (1992); *Garono v. State*, 37 Ohio St.3d 171, 173, 524 N.E.2d 506 (1988); *Salem Iron Co. v. Hyland*, *supra* at 166.

G. Appellant failed to meet Civ. R. 23(B)(3) elements as questions of law or fact do not predominate over questions affecting only individual members because it would require individualized inquiry into each and every case before the Berea Municipal Court since 1995. Further, the superior method for the adjudication of the class members' claim was in their individual criminal matters before the Municipal Court with a right to appeal.

Civil Rule 23 (B)(3) provides that an action may also be maintained as a class action if:

the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or

defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.

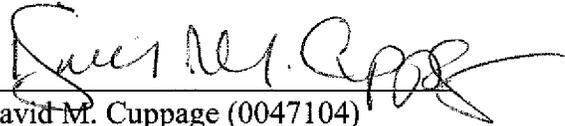
As the Ohio Supreme Court recognized in *Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 67, 80, Civ. R. 23 (B)(3)'s purpose "was to bring within the fold of maintainable class actions cases in which the efficiency and economy of common adjudication outweigh the interests of individual autonomy."

The issue for the Trial Court's determination was whether the issues of law or fact predominate over any questions affecting only individual members of the class and if a class action is the superior method of resolution. As set forth above, the Trial Court erred in that the class definition it certified will require individualized inquiry into each and every case which has already been resolved in Berea Municipal Court since 1995. Each member of the Trial Court's amended class definition had the right to control their defense to the charges which brought them before the municipal court in the first instance. Likewise, each member of the class has already concluded on their own terms the litigation which concerns the purported controversy presently before the court in this matter. As such, there can be nothing gained by concentrating this litigation before the Trial Court on claims that have already been resolved. Such an inquiry is contrary to the judicial economy purpose of Civ. R. 23(B)(3) and fails to meet the predominance and superiority elements.

CONCLUSION

This Court should affirm the decision of the Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of Defendant-Appellee, Raymond J. Wohl, Clerk of the Berea Municipal Court's Merit Brief has been served via e-mail, this 13 day of May 2013, upon the following parties:

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